

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | CASE NO. CR06-466 TSZ |
| |) | |
| v. |) | SEATTLE, WASHINGTON |
| |) | June 8, 2009 |
| DAVID MENDOZA, |) | |
| |) | Status conference |
| Defendant. |) | |
| |) | |

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROGER ROGOFF

For the Defendant: COLETTE TVEDT

Reported by: NANCY L. BAUER, CCR, RPR
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1 June 8, 2009

11:00 a.m.

PROCEEDINGS

2
3 THE CLERK: CR06-466Z, United States of America v.
4 David Mendoza. Counsel, please make your appearances for the
5 record.

6 MR. ROGOFF: Good morning, Your Honor. Roger Rogoff
7 for the United States.

8 MS. TVEDT: Good morning, Your Honor. Colette Tvedt
9 on behalf of Mr. Mendoza.

10 THE COURT: All right. You've appeared, along with
11 Ms. Lee and Mr. Robinson.

12 MS. TVEDT: That's correct, Your Honor.

13 THE COURT: All right. This is a status conference.
14 The court has pending before it joint motions to continue the
15 trial date, and the court concluded from reading the papers
16 that there was just precious little information provided to
17 me that would justify a continuance of the trial date, and
18 thus, I want to know more about the charges, the length of
19 trial, and other issues that might inform me better on
20 whether or not a continuance should be granted, and if so,
21 for what period of time.

22 So let me ask government counsel first. Just walk me
23 through the superseding indictment, and tell me, generally,
24 what's the nature of the case. I can read what the
25 indictment says. It's not clear to me the difference between

1 Count 1 and Count 2. You allege two different conspiracies,
2 it looks like it's just two different theories involving the
3 same substantive counts which follow, but you may clarify
4 that.

5 What's involved? How long would it take the government to
6 put on their case? Why can't you be prepared to proceed when
7 it's set for trial at the end of this month? Go ahead.

8 MR. ROGOFF: Certainly, Your Honor. There are seven
9 counts here. The first is conspiracy to import more than a
10 thousand kilograms of marijuana; the second is conspiracy to
11 possess marijuana on an aircraft, more than a thousand
12 kilograms. So it's a slightly different charge. Yes, they
13 do relate --

14 THE COURT: The substantive counts, I gather, are
15 Count 3, on August 4, 2005; Count 4, February 7, 2006; and
16 then Count 5 is a period of time.

17 MR. ROGOFF: Correct.

18 THE COURT: But all of those would be relating to
19 each of the two conspiracies you allege?

20 MR. ROGOFF: That's correct, Your Honor.

21 THE COURT: So the proof would be all the same,
22 basically?

23 MR. ROGOFF: Yes.

24 THE COURT: Are you charging it more than once? Why
25 do you need two conspiracies to proceed to trial?

1 MR. ROGOFF: Well, I think, Your Honor, that the
2 purpose of indicting the defendant in the way that it
3 occurred was to give some weight to the idea that the
4 defendant was using an aircraft to do this, which is
5 different than most of the conspiracies that we see in this
6 district, or at least some of them. We wanted that to be
7 reflected in the charges that were before the jury, and we
8 wanted the jury to understand the significance of that
9 particular act. That's why it was charged as two separate
10 conspiracies.

11 THE COURT: Your evidence of Count 1 and Count 2
12 would be the same, would it not?

13 MR. ROGOFF: The evidence would be similar.
14 They're --

15 THE COURT: How would it be different?

16 MR. ROGOFF: Well, Your Honor, the conspiracy to
17 import can occur in ways other than just on an aircraft.

18 THE COURT: I understand that. But your evidence in
19 this case relates to an aircraft; is that right?

20 MR. ROGOFF: That's correct, Your Honor. It's
21 several aircraft over a period of time.

22 THE COURT: How many witnesses and how long would it
23 take to put on your case with respect to the counts, before
24 we get to the money laundering and the other count?

25 MR. ROGOFF: Your Honor, I have approximately 25

1 witnesses. I would assume that this case would take a week,
2 maybe a day past that.

3 THE COURT: And is that for the marijuana charges, as
4 opposed to the money laundering charge?

5 MR. ROGOFF: That would be everything, Your Honor.

6 THE COURT: Everything?

7 MR. ROGOFF: And with --

8 THE COURT: And from your vantage point, are you
9 ready to go to trial?

10 MR. ROGOFF: No, we're not ready to go to trial yet,
11 Your Honor. The main reason we're not ready to go to trial
12 has to do with Tim Smith, who is one of the witnesses in this
13 case, who we were sort of in control of back in 2006 when the
14 defendant left the country and ended up in Spain, but who
15 has, since that time, moved. We have located him, and we are
16 seeking to depose him, which is one of the motions that is
17 before the court.

18 THE COURT: Well, it was before the court because it
19 got filed on the 5th of June. It wasn't mentioned in the
20 motion to continue the trial date. Why couldn't that
21 deposition be taken in the next two or three weeks?

22 MR. ROGOFF: Well, one of the difficult things is
23 that he is in Canada, and in order to arrange that, we need
24 his assent, because there was no way to subpoena him in
25 Canada. That took some time. We also needed the assent of

1 defense counsel, which now we have. That took some time. We
2 know that --

3 THE COURT: So the defense has agreed to this
4 procedure? No response been filed or due yet, but I wanted
5 to try and deal with the motion, so to the extent it can be
6 ordered, we can proceed with it.

7 MS. TVEDT: Your Honor, I'm not prepared to address
8 the motion that was filed on the 5th. I just saw it today,
9 and I don't know if we're agreeing to that motion. I can
10 look at it and file a response within the next few days. I
11 would speak with Mr. Robinson.

12 THE COURT: What would your objections be?

13 MS. TVEDT: There potentially is a proffered issue on
14 whether or not they want the videotaped deposition of
15 Mr. Smith in Vancouver, I think, is where he is. I have not
16 looked over the pleadings yet, so I don't feel like I'm in a
17 position to respond to it. We may not object, but I'd ask
18 for time to review the pleadings.

19 THE COURT: What I heard from government counsel is
20 not correct? There is no agreement? Is that where it is?

21 MR. ROGOFF: There's an agreement with Mr. Smith's
22 counsel, Your Honor. Sorry if I misspoke.

23 THE COURT: Oh, I'm sorry. Perhaps you said that and
24 I didn't understand the distinction.

25 Tell me what the nature of the claims are with respect

1 to -- I mean, Count 3 is one aircraft arriving in the Western
2 District on August 4, 2005?

3 MR. ROGOFF: That's correct, Your Honor.

4 THE COURT: And Count 4 is one aircraft load on
5 February 7th, 2006?

6 MR. ROGOFF: That's correct, Your Honor.

7 THE COURT: And how many airplane loads are alleged
8 in Count 5?

9 MR. ROGOFF: Your Honor, there's no specific amount.
10 This relates to testimony from different cooperating
11 witnesses who talk about different loads. I would not be
12 able to give you an accurate number standing here right now,
13 but --

14 THE COURT: I mean --

15 MR. ROGOFF: -- more than one.

16 THE COURT: You can't tell me right now how many
17 different airplane loads of drugs were brought in during
18 June 1 through August 17th, 2006, described as the Cramer
19 loads? You tell me you don't know?

20 MR. ROGOFF: Your Honor, I don't have that
21 information before me.

22 THE COURT: Well, I would think, with a trial date in
23 three weeks, you would have been talking to some witnesses
24 and have some idea what's going on here.

25 MR. ROGOFF: Well, as you probably know, I don't like

1 to do this, but I just came onto this case not three or four
2 days ago. So I just filed a notice of appearance. So I'm
3 still catching up. Ms. Roe is out of town today, which is
4 why I'm covering the hearing today. I apologize to the
5 court, but I'm limited somewhat to the factual basis of what
6 I can give you.

7 THE COURT: Are you substituting, or are you joining
8 the team?

9 MR. ROGOFF: I'm joining the team.

10 THE COURT: So 20 or 25 witnesses, about a week or
11 more to try the case?

12 MR. ROGOFF: Yes, Your Honor.

13 THE COURT: And the government is not ready to go to
14 trial on the date set?

15 MR. ROGOFF: That's correct, Your Honor. We're
16 asking for, essentially, another four weeks, from the end of
17 June to the beginning of August. We're not asking for a
18 significant period of time. We're asking for a short period
19 of time to get these witnesses on track.

20 THE COURT: What would be your position if the court
21 doesn't have a trial date he can give you in August but we
22 could do it in early September?

23 MR. ROGOFF: The government can look at it, Your
24 Honor.

25 THE COURT: All right. Let's hear from the defense.

1 MS. TVEDT: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MS. TVEDT: We're also asking for --

4 THE COURT: Use the podium and, more importantly, the
5 microphone system.

6 MS. TVEDT: Your Honor, Mr. Mendoza was arraigned
7 before the court on May 4th, and the trial date of June 29th
8 was originally set, which was approximately a 57-day period
9 to prepare for this case.

10 As the court is aware from the charges, he's facing a
11 mandatory minimum of 20 years on the conspiracy of over a
12 thousand kilograms of marijuana. We have received
13 significant discovery from Ms. Roe. She gave us
14 approximately 245 pages on May 19th and another 200 pages, or
15 approximately, on May 29th. According to Ms. Roe, there's
16 still outstanding discovery that is due to us. There are,
17 from what Mr. Rogoff has said, at least 25 witnesses, and it
18 is our understanding, from speaking with Ms. Roe, that one of
19 their witnesses, Timothy Smith, is in Canada, and that they
20 wanted to schedule a deposition.

21 One of the other things that Ms. Roe shared with us is
22 that she would have to get permission from the Department of
23 Justice, and it's 21-day lag period to do that deposition.

24 THE COURT: I don't quite understand. That
25 permission from the Department of Justice has not been

1 obtained?

2 MS. TVEDT: That was my understanding, Your Honor,
3 from speaking with Ms. Roe.

4 THE COURT: Even if there were an agreement?

5 MS. TVEDT: That's my understanding, that even if
6 there's an agreement, that she would still have to apply for
7 and receive permission from the Department of Justice to go
8 to Canada to depose a witness.

9 THE COURT: Counsel, can you add anything to that
10 issue? I mean, this would be an advisory opinion, then, on
11 my part to rule on the government's motion for a Rule 15
12 deposition if the Justice Department hasn't approved it?

13 MR. ROGOFF: Your Honor, that's the information that
14 I have. It would take that period of time in order to get
15 the deposition done.

16 THE COURT: No, that's a different subject. The
17 question is: Do you have all the authority you need from the
18 Department of Justice to proceed in that manner with the Rule
19 15 deposition? Do you know whether you need their consent?

20 MR. ROGOFF: I don't know, Your Honor.

21 THE COURT: All right. Go ahead, Counsel.

22 MS. TVEDT: Your Honor, so when we --

23 THE COURT: Your understanding from Ms. Roe is they
24 somehow need the Department of Justice to sign off?

25 MS. TVEDT: That was my understanding, Your Honor,

1 and I could be wrong. But that's what I interpreted Ms. Roe
2 to be saying when we met with her on Friday; that she would
3 need to apply for that permission to leave the country to do
4 the deposition. So that's all I can tell the court.

5 Your Honor, we have been working diligently to try to
6 resolve the case. One of the things the court may be aware
7 of is that we're asking for a settlement judge. We met on
8 Friday, and we're hoping to be sent out to a settlement judge
9 either tomorrow or Wednesday. We're close to trying to
10 resolve this case.

11 THE COURT: If we're close, why not keep the trial
12 date and get the settlement judge?

13 MS. TVEDT: We're just trying to be -- in all
14 honesty, with the type of charges and the length of time
15 Mr. Mendoza is facing, we're only asking for an additional
16 few weeks. I counted this morning, from May 4th, the date of
17 the arraignment, to August 10th, it comes out to 13 weeks to
18 prepare for trial.

19 Mr. Robinson and myself are trying diligently to get all
20 the information to prepare the case for trial. I think that,
21 given the nature of the charges, that that's a fair request
22 to get a case continued. Hopefully we can resolve the case,
23 Your Honor, but that's where we are. And I think in the
24 motion for continuance we put into the court some of the
25 things that have been going on with Mr. Robinson. Right

1 after the arraignment, he was out of the office for a week
2 with a flu. He just finished his civil trial on Friday. And
3 now he is schedule to fly out to Guantanamo Bay for a
4 week-long -- he's involved with one of the terrorist cases in
5 Guantanamo Bay. So with that, we're asking the court to give
6 us the continuance to August 10th.

7 THE COURT: What would your view be with respect to a
8 continuance to early September?

9 MS. TVEDT: We have no objection. We have the
10 paperwork that Mr. Mendoza can file the waiver of speedy
11 trial. We have that here for the court's consideration.

12 THE COURT: You did file a waiver already through
13 August?

14 MS. TVEDT: That's correct, but if court would be
15 inclined to put it to September, we can do that.

16 THE COURT: What I'm inclined to do, if a continuance
17 is granted, the parties to seem to suggest August 10th, but
18 that's not a date available on my calendar. I'm thinking in
19 terms of September 8th.

20 MS. TVEDT: That should be fine.

21 THE COURT: The Tuesday after Labor Day. The
22 defendant is in custody, and I know he wants his trial sooner
23 rather than later. Have you had an opportunity to discuss
24 with him pushing the trial to that day?

25 MS. TVEDT: I did.

1 THE COURT: Any objection?

2 MS. TVEDT: No objection, Your Honor.

3 THE COURT: Mr. Mendoza, let me directly ask you.
4 You don't have to respond to any of my questions, if you
5 don't want to. You may talk to your lawyer before you
6 answer, if you'd like.

7 Your counsel has joined in the filing of a motion for a
8 continuance, and you've apparently signed a waiver through
9 August 10th. Do you have any objection, sir, to continuing
10 the trial until September 8th?

11 THE DEFENDANT: Good morning, sir. No, I do not.

12 THE COURT: I know this has been a concern, because
13 it's an old case. You were, obviously, on holiday in Spain,
14 until you were apprehended, and we had some issues getting
15 you back here. We've had some forfeiture issues that arose
16 in your absence. But in any event, you don't object in any
17 way to a continuance of the trial through September 8th,
18 which would be a Tuesday?

19 THE DEFENDANT: I'm fine with that, sir.

20 THE COURT: Am I understanding from defense that you
21 think a week to two weeks is what we need to try this case?

22 MS. TVEDT: Your Honor, I would agree with that
23 assessment. It's about a two-week trial, at the most.

24 THE COURT: All right. First, there is a motion
25 before the court to continue the trial. It was an unclosed

1 motion, but the motion papers did not provide me with
2 sufficient information to justify a finding that the ends of
3 justice are served by a continuance and outweigh the interest
4 of the public and the defendant in a speedy trial. And I now
5 believe that, understanding the breadth of the case,
6 approximately 25 witnesses, the complexity of the case
7 involving various alleged deliveries of drugs into the
8 country by aircraft over a period of time that spanned,
9 according to Count 1, five years prior to August 17th, 2006.
10 But more specifically, from June 1 of 2005, through,
11 apparently, August 17th of 2006, a number of airplane
12 deliveries are alleged to have occurred involving marijuana.
13 The Count 6 deals with another conspiracy to engage in money
14 laundering, and Count 7, a structuring of currency
15 transaction.

16 I'm satisfied that, apparently, the government has filed
17 an enhanced penalty information, which requires, or would,
18 perhaps, require a minimum statutory minimum of 20 years if
19 convicted on all counts.

20 Defense counsel have indicated -- well, all counsel have
21 indicated their objections. We do have the -- I want to
22 speak more about this Rule 15 issue, but in any event, I'm
23 satisfied that the interest of justice requires a continuance
24 of trial be granted. I'll grant the motion and continue the
25 trial to September 8th, 2009, and exclude all time from this

1 date until that date under the Speedy Trial Act, and I find
2 the requirements of the Speedy Trial Act are satisfied under
3 18 U.S.C. Section 3161(h)(8). The court will enter a brief
4 order consistent with my ruling.

5 I want to get back to this Rule 15 deposition. I
6 understand that it was just filed, response is not due. But
7 I took a few moments to read the case, the basic case cited
8 by the government's counsel, *United States v. Medjuck*,
9 156 F.3d 916, Ninth Circuit, 1998. It appears in this case,
10 from what the government represents, at least, that this
11 Mr. Smith is currently in Canada. He's been located. He's
12 agreed to do a deposition but is not subject to subpoena
13 power by the government but in all likelihood would be
14 unavailable for purposes of Rule 15 and seems to justify such
15 a deposition.

16 I'm troubled by the government's filing of the motion if
17 they have not received the Justice Department's consent in
18 advance, and I think that would be a prerequisite. So I'd be
19 very surprised if that's still necessary.

20 But in any event, I guess the government should file a
21 some sort of pleading in the next three days that tells us
22 whether or not they got consent, because if they don't, I'm
23 going to strike the motion. It's certainly premature if they
24 haven't got whatever necessary consents they have or need to
25 bring the motion.

1 Now, the motion outlines a couple of alternatives, both of
2 which would suggest or require that the defendant himself
3 personally be present here in Seattle at the courthouse and
4 attend a deposition by video conferencing with one of his
5 lawyers, while another lawyer appears either in Vancouver or
6 somewhere in Canada, or at the border under circumstances to
7 be worked out.

8 I don't see a particular difference in either of those. I
9 don't know that it's possible to, but the parties should
10 explore the possibility of even getting the defendant up to
11 the border. But I think, logistically, the fact he's in
12 custody, that's probably not very realistic, and the video
13 conferencing probably is almost as workable. And although
14 not committing, I'm going to suggest to you that if you can
15 work out the details, and I'm assuming the defendant is
16 present here in this courthouse with his counsel, and I would
17 assume the government -- another government counsel as well,
18 that it may be appropriate for me to attend that deposition
19 and rule on my objections as they are made so that we don't
20 find ourselves in a situation where some objection was made,
21 a legitimate objection that might have been cured at the
22 time. So that's a possibility that I would attend that
23 deposition and rule during the course of the deposition so we
24 have a complete transcript, with everybody understanding
25 what's been admitted and what hasn't been admitted or will be

1 admitted into evidence.

2 The response for that is the 12th, this Friday. Are you
3 going to be able to get your response in by then?

4 MS. TVEDT: Yes, Your Honor.

5 THE COURT: Again, counsel, if you haven't gotten
6 your attorney general's approval to file this motion or
7 consent to do this deposition, I think you should notify the
8 court and counsel, and if you don't have the consent, they
9 don't need to respond to the motion.

10 All right, I know you want a settlement judge. I heard
11 you wanted it in the next couple of days. I suppose the rush
12 is somewhat off with the continuance of the trial date, and
13 it would have been unlikely I could have found a settlement
14 judge so quickly. In any event, when are you realistically
15 hoping you'd have a settlement? I would hope it would be
16 within the next couple of weeks, but, again, that depends a
17 little bit on who the counsel is that Mr. Mendoza is going to
18 have at the settlement conference. If I attempt to find a
19 settlement judge, what period of time or what days would you
20 propose? You can have whoever you want present.

21 MS. TVEDT: And that's why, for this week, I knew
22 that myself and Mr. Robinson were available Tuesday and
23 Wednesday.

24 THE COURT: I think it's unlikely we're going to find
25 a judge just sitting here waiting for me to call him up and

1 be a settlement judge.

2 MS. TVEDT: I could call the court when I get back to
3 the office. I know what my schedule is, but not
4 Mr. Robinson's, for this week or the following week. We're
5 attending a conference in Lake Chelan Thursday through Sunday
6 of this week.

7 THE COURT: Let me first find a judge, and then the
8 judge will contact your office and see if we can work out a
9 date.

10 Let me address Mr. Mendoza directly and just tell you,
11 sir, that under our local rules and upon the request of both
12 parties, we make available a settlement judge, a different
13 judge, not me, because I'll be handling the case if it goes
14 to trial. You have to consent to that procedure, and if you
15 consent, you and your lawyer can show up, and anything that's
16 said at that time before that settlement judge is off the
17 record and will not be disclosed to me, unless you agree to a
18 settlement and plea. Obviously, I'll learn that that's
19 happened. Other than that, anything that's said is totally
20 confidential and won't be provided to me in any way by
21 counsel or the judge. And at any time during that settlement
22 procedure, if you decide this isn't really working out the
23 way you wanted it to, you can stop the settlement procedure.
24 You can do that at any time. Just tell your counsel you
25 don't want to proceed any further in that process, and the

1 process would end, and I'll only be told the parties weren't
2 able to reach a settlement. Do you have any questions?

3 THE DEFENDANT: No, sir. I agree with those
4 conditions.

5 THE COURT: All right. Anything else we can
6 accomplish today? We had a pretrial conference date
7 scheduled for June 19th at 11:00 a.m. That deadline should
8 be stricken with the continuance of the trial date. Perhaps
9 we can push off the motions deadline for 30 days or so.
10 Let's pick a new motions cutoff of July 10th. Anything else?
11 And we'll set some sort of a status conference several weeks
12 before the trial, just to see where we are, if we haven't
13 been notified of a settlement. Anything else we can
14 accomplish today?

15 MR. ROGOFF: No, Your Honor.

16 MS. TVEDT: Nothing further, Your Honor.

17 THE COURT: All right. We'll be in recess. Have a
18 nice day.

19
20

(THE PROCEEDINGS CONCLUDED.)

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for

the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 14th day of July 2010.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter